NO. 83-1968

IN THE

Supreme Court of the United States

October Term, 1985

Lacy H. Thornburg, et al.,

Appellants,

vs.

Ralph Gingles, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEES OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; AND, LEAGUE OF WOMEN VOTERS EDUCATION FUND

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Come now the above listed organizations, by counsel, and move the Court for leave to file a brief amici curiae in support of the Appellees in

the above styled cause.[1]

The American Civil Liberties Union Foundation, Inc. (ACLU) is a non-profit, nationwide, membership organization whose purpose is the defense of the fundamental rights of the people of the United States. A particular concern of the ACLU is the enforcement of the Fourteenth and Fifteenth Amendments, and implementing legislation enacted by Congress, in the area of minority voting rights. Attorneys associated with the ACLU have been involved in numerous voting rights cases on behalf of racial minorities, including, most recently in this Court, Hunter v. Underwood, ____U.S. ____, 105 S. Ct. 1916 (1985);

[1]Counsel for the Appellants have not given consent to the filing of this brief.

McCain v. Lybrand, ____ U.S. ____, 104 S. Ct. 1037 (1984); and Rogers v. Lodge, 458 U.S. 613 (1982).

The League of Women Voters of the United States (LWVUS, or League) is a national, nonpartisan, nonprofit membership organization with 110,000 members in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. The LWVUS's purpose is to promote political responsibility through informed and active participation of citizens in government. The LWVUS believes voting is a fundamental right that must be fostered and protected. With its network, the LWVUS was a major participant in the effort to strengthen and extend the Voting Rights Act in 1982. Leagues and the LWVUS have been active in voting rights litigation.

The League of Women Voters

Education Fund (LWVEF), an affiliate of the LWVUS, is a nonpartisan, nonprofit education organization, one of whose purposes is to increase public understanding of major public policy issues. The LWVEF provides a variety of services, including research, publications, monitoring and litigation on current issues, such as voting rights and election administration. The LWVEF's docket includes Jones v. City of Lubbock, 730 F.2d 233, 727 F.2d 364 (5th Cir. 1984), in which a local League member was a named plaintiff.

This case presents important issues involving the application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and whether the statute protects equal, or as argued by Appellants and the United States, merely token minority access to the political

process. Because of the experience of amici in advocating minority voting rights, and because the parties may not adequately present the Section 2 issues discussed in this brief, amici believe their views may be of some benefit to the Court in resolving the issues raised in this appeal.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interests of amici curiae are set forth in the motion for leave to file this brief, supra, p. x.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief of Appellees.

SUMMARY OF ARGUMENT

In 1982 Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to make clear its purpose of prohibiting voting procedures that result in discrimination. The construction urged upon this Court by the Appellants and the Solicitor General -- that the election of a token number of minorities to office in the disputed districts of North Carolina's 1982 legislative reapportionment forecloses a challenge under Section 2 -- is totally inconsistent with Congress's purposes in

amending Section 2.

The language and the legislative history of Section 2 expressly show that there is no validity to the argument that minimal success by minority candidates can be equated with fair and effective participation of minorities in the political process. Section 2 is designed to protect the right to equal, not token or minimal, participation. The extent to which minorities have been elected is only one of the factors to be considered by a court in evaluating a Section 2 claim.

Congress has articulated a policy that favors strong enforcement of civil rights. Such a policy clearly does not embrace tokenism or minimalism in voting. If the Appellants and the Solicitor General prevail in their argument, there will be no incentive for

jurisdictions to comply voluntarily with the Voting Rights Act, but instead they will be encouraged to resist and to circumvent Section 2.

The district court applied correct legal standards and methods of analysis in finding racial bloc voting. The imposition of any rigid definitions or methodologies for proving bloc voting would be inconsistent with the purposes of Section 2, would unduly burden minority plaintiffs and in some cases would make it impossible to challenge discriminatory voting practices.

The judgment below should be affirmed on the grounds that the trial court properly applied Section 2.

ARGUMENT

I. THE ELECTION OF A TOKEN NUMBER OF MINORITY CANDIDATES DOES NOT FORECLOSE A SECTION 2 CHALLENGE.

A. The Statute and the Legislative History

Both the Appellants and the Solicitor General, as counsel for amicus curiae the United States, argue that the election of a token number of minorities to office in the disputed districts of North Carolina's 1982 legislative reapportionment absolutely forecloses Appellees' challenge to the diluting effect of at-large voting and multi-member districting under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. See Appellants' Brief, p. 24: "The degree of success at the polls

enjoyed by black North Carolinians is sufficient in itself to distinguish this case from White [v. Regester ,412 U.S. 755 (1973] and Mobile [v. Bolden, 446 U.S. 55 (1980)] and to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process." (emphasis supplied); Brief for the United States as Amicus Curiae, p. 27: "multimember districts are not unlawful where, as here, minority candidates are not effectively shut out of the electoral process."[1]

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[1]The Solicitor General, underscoring the extremity of this position, noted that "[t]he closest analogy to this case is Dove v. Moore, supra, in which the court of appeals upheld the validity of an at-large system under which the 40% black minority elected one member to an eight-member city council." (emphasis supplied). Id., at 27-8.

The argument that minimal success by minority candidates absolutely forecloses a Section 2 challenge is refuted by the language of the statute itself.[2] First, the statute requires

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[2]Section 2 provides in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members

[Footnote continued]

that political processes be "equally open" to minorities, and that they not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The right protected by the statute, therefore, is one of equal, not token or minimal, political participation.

Second, the statute directs the trial court to consider "the totality of circumstances" in evaluating a violation, and provides that "[t]he

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of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." Obviously, if black electoral success is merely one of the "totality" of circumstances which may be considered by a court in evaluating a Section 2 claim, a finding of minimal or any other level of success could not be dispositive. The statute on its face contemplates that other circumstances may and should be considered.

The legislative history of Section 2 makes the point explicitly. It provides that factors in addition to the election of minorities to office should be considered, and that minority candidate success does not foreclose the possibility of dilution of the minority vote. See Senate Rep. No. 97-417, 97th

Cong., 2d Sess. 29 n.115 (1982) (hereinafter "Senate Rep.").

In 1982, Congress amended Section 2 to provide that any voting law or practice is unlawful if it "results" in discrimination on acount of race, color or membership in a language minority. 96 Stat. at 134, §3, amending 42 U.S.C. § 1973. Prior to amendment, the statute provided simply that no voting law or practice "shall be imposed or applied...to deny or abridge the right...to vote on account of race or color" or membership in a language minority.[3] A plurality of this Court,

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[3]The statute provided in its entirety: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section

[Footnote continued]

however, in City of Mobile v. Bolden, 446 U.S. 55, 60-1 (1980), held that "the language of §2 no more than elaborates upon that of the Fifteenth Amendment," which it found to require purposeful discrimination for a violation, and that "the sparse legislative history of §2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."

Congress responded directly to City of Mobile by amending the Voting Rights Act. The House, by a vote of 389 to 24, passed an amendment to Section 2 on October 5, 1981. 127 Cong. Rec. H7011 (daily ed., Oct. 5, 1981). The House bill, H.R. 3112, provided (the language in brackets was deleted and the language in italics was added):

1973b(f)(2) of this Title."

> Section 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

As the Report of the House Committee on the Judiciary explained, the purpose of the amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision," and "to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the

challenged practice." House Rep. No. 97-227, 97th Cong., 1st Sess. 29 (1981) (hereinafter "House Rep.").

In the Senate, the Subcommittee on the Constitution, chaired by Senator Orrin Hatch, rejected the Section 2 amendment and reported out a ten year extension of Section 5 and the other temporary provisions of the Act by a vote of 3 to 2. Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 67 (1982). The Senate Judiciary Committee, however, pursuant to the so-called "Dole Compromise," authored by Sen. Robert Dole, returned the results standard to Section 2 and added subsection (b), taking language directly from White v. Regester, 412 U.S. 755, 766 (1973). The purpose of the addition was to clarify

that the amended statute "is meant to restore the pre-Mobile legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote," and "embodies the test laid down by the Supreme Court in White." Senate Rep. at 27. The Senate bill also provided, as did the House bill, that amended Section 2 did not guarantee the right to proportional representation. Id., at 30-1.

The Senate disclaimer was designed to meet criticism, particularly by Senator Hatch, that the language of the House bill would permit a violation of the statute merely upon a showing of lack of a proportional number of minorities in office and "an additional scintilla of evidence." Voting Rights Act: Hearings Before the Subcomm. on the

Constitution of the Senate Comm. of the Judiciary, Vol. 1, 97th Cong., 2d Sess. 516 (1982) (hereinafter "Senate Hearings"). The compromise language was intended to clarify (if indeed clarification was needed) that a court was obligated to look at the totality of relevant circumstances and that, as in "this White line of cases," minority office holding was "one circumstance which may be considered." 2 Senate Hearings at 60 (remarks by Senator Dole). The compromise language, however, was not intended to alter in any way the House bill's totality of circumstances formulation based upon White. That is made clear by the Senate Report which provides that the Committee's substitute language was "faithful to the basic intent of the Section 2 amendment adopted by the

House," and was designed simply "to spell out more specifically in the statute the standard that the proposed amendment is intended to codify." Senate Rep. at 27.

The Senate passed the Senate Judiciary Committee's Section 2 bill without change on June 18, 1982. 128 Cong. Rec. S7139 (daily ed., June 18, 1982).[4] The Senate bill (S. 1992) was returned to the House where it was incorporated into the House bill (H.R. 3112) as a substitute, and was passed unanimously. 128 Cong. Rec. H3839-46 (daily ed., June 23, 1982).

Both the House and Senate Reports

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[4]Prior to passage the Senate defeated by a vote of 81 to 16 a proposed amendment deleting the "results" language from the bill introduced by Senator John East. 128 Cong. Rec. S6956, S6965 (daily ed., June 17, 1982).

give detailed guidelines on the implementation of Section 2 and congressional intent in amending the statute. According to the Senate Report, plaintiffs can establish a violation by showing "a variety of factors [taken from White, Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub. nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), and other pre-Bolden voting cases], depending upon the kind of rule, practice, or procedure called into question." Senate Rep. at 28. Typical factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
Id., at 28-9.

The factors set out in the Senate Report were not deemed to be exclusive, but illustrative: "while these

enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." Id. In addition, Congress made it plain that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. Instead, Section 2 "requires the court's overall judgment based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is...'minimized or cancelled out.'" Id., at 29 n.118.

The House Report is to the same effect: "the court should look to the context of the challenged standard, practice or procedure," and consider "[a]n aggregate of objective factors" taken from pre-Mobile decisions, similar

to those set out in the Senate Report. House Rep. at 30. And like the Senate Report, the House Report provides that "[a]ll of these factors need not be proved to establish a Section 2 violation." Id.

Not only does the legislative history provide that no one factor is dispositive in vote dilution cases, and that the courts should consider the totality of relevant circumstances, but the argument of the State and the Solicitor General that minimal or token minority candidate success forecloses a statutory challenge was considered and expressly rejected. While the extent to which minorities have been elected to office is a significant and relevant factor in vote dilution cases, the Senate Report indicates that it is not conclusive.

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section. Zimmer 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a 'safe' minority candidate. 'Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution...Instead we shall continue to require an independent consideration of the record.' Ibid.
>
> Id., at 29 n.115[5]

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[5]The Solicitor General attempts to discount the Senate Report on this point by arguing that the report "cannot be taken as determinative on all counts." Brief for the United States as Amicus Curiae, p. 24 n.49. Of course, this Court has "repeatedly stated that the authoritative source for finding the legislature's intent lies in the Committee reports on the bill." Zuber v. Allen, 396 U.S. 168, 186 (1969). Accord, Garcia v. United States,

[Footnote continued]

In Zimmer, relied upon in the Senate Report, three black candidates won at-large elections in East Carroll Parish after the case was tried. The county argued, as the State and Solicitor General do here, that these successes "dictated a finding that the at-large scheme did not in fact dilute the black vote." 485 F.2d at 1307. The Fifth Circuit disagreed:

> we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations - namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district.
> Id.

_____U.S._____, 105 S. Ct. 479, 483 (1984). In any case, there is simply nothing in the legislative history to indicate that there was any disagreement with the proposition that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this Section." Senate Rep. at 29, n. 115.

Similarly, in White v. Regester, the case principally relied upon by Congress as embodying the "results" standard it incorporated into Section 2, and whose language Congress expressly adopted, two blacks and five Mexican-Americans had been elected to the Texas Legislature from Dallas and Bexar Counties. 412 U.S. at 766, 768-69. Despite that level of minority candidate success, which is greater than that in

some of the districts claimed by the State and the Solicitor General to be immune from a Section 2 challenge here, e.g. House Districts 8 and 36, and Senate Districts 2 and 22, this Court in a unanimous decision held at-large elections impermissibly diluted minority voting strength in those counties.

In addition to White and Zimmer, the Congress, in amending Section 2, relied upon some 23 courts of appeals decisions which had applied a results or effect test prior to City of Mobile. Senate Rep. at 32, 194; 128 Cong. Rec. S6930 (daily ed. June 17, 1982) (remarks of Sen. DeConcini):[6] One of those 23

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[6]The 23 cases are listed and discussed in 1 Senate Hearings at 1216-26 (appendix to prepared statement of Frank R. Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law).

cases, Kirksey v. Board of Supervisors, 554 F.2d 139, 149 n.21 (5th Cir. 1977), commented upon the continuing validity of the Zimmer rule that the election of a minimal number of blacks did not foreclose a dilution claim: "we add the caveat that the election of black candidates does not automatically mean that black voting strength is not minimized or cancelled out." Accord, Cross v. Baxter, 604 F.2d 875, 880 n.7, 885 (5th Cir. 1979).

Cases decided since the amendment of Section 2 have predictably applied the statute in light of the legislative history and rejected the contention that minimal or token black success at the polls forecloses a dilution claim. See, United States v. Marengo County Commission, 731 F.2d 1546, 1571-72 (11th Cir. 1984) ("it is equally clear that

the election of one or a small number of minority elected officials will not compel a finding of no dilution"), cert. denied, _____ U.S._____, 105 S. Ct. 375 (1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1023 (5th Cir. 1984) ("In the Senate Report...it was specifically noted that the mere election of a few minority candidates was not sufficient to bar a finding of voting dilution under the results test."); Major v. Treen, 574 F. Supp. 325, 339 (E.D. La. 1983); Rybicki v. State Board of Elections, 574 F. Supp. 1147, 1151 and n.5 (E.D. Ill. (1983).

The necessity of considering factors other than the election of minorities to office is particularly apparent in House District 21 (Wake County) and House District 23 (Durham County), districts in which blacks,

according to the Solicitor General, have enjoyed "proportional representation." Brief for the United States as Amicus Curiae Supporting Appellants, p.25. While one black has been elected to the three member delegation from House District 23 since 1973, and a black has been elected in 1980 and 1982 to the six member delegation from House District 21, the district court found this success was the result of single shot voting by blacks, a process which requires minorities to give up the right to vote for a full slate of candidates. According to the lower court, "[o]ne revealed consequence of this disadvantage [of a significant segment of the white voters not voting for any black candidate] is that to have a chance of success in electing candidates of their choice in these

districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." Gingles, 590 F. Supp. at 369. Under the circumstances, the election of blacks in these districts can not mask the fact that the multi-member system treats minorities unfairly and dilutes their voting strength.

Black voters in House District 23 must forfeit up to two-thirds of their voting strength and black voters in House District 21 must forfeit up to five-sixths of their voting strength to elect a candidate of their choice to office. Whites, by contrast, can vote for a full slate of candidates without forfeiting any of their voting strength and elect candidates of their choice to

office. Such a system clearly does not provide black voters equal access nor the equal opportunity to participate in the political process and elect candidates of their choice to office. That is another reason why the mere election of even a proportional number of blacks to office does not, and should not, foreclose a dilution challenge. As Section 2 and the legislative history provide, a court must view the totality of relevant circumstances to determine whether the voting strength of minorities is in fact minimized or abridged in violation of the statute.

To summarize, the position of the State and the Solicitor General that the election of a token or any other number of blacks to office bars a dilution challenge must be rejected because it is contrary to the express language of

Section 2, the legislative history and the pre-Mobile line of cases whose standards Congress incorporated into the "results" test.

B. Congressional Policy Favors Strong Enforcement of Civil Rights Laws

Congress enacted the Voting Rights Act of 1965 as an "uncommon exercise of congressional power" designed to combat the "unremitting and ingenious defiance of the Constitution" by some jurisdictions in denying minority voting rights. South Carolina v. Katzenbach, 383 U.S. 301, 309, 334 (1966). Based upon the continuing need for voting rights protection, Congress extended and expanded the coverage of the Act three

times - in 1970, 1975 and 1982.[7] It would be illogical to suppose, that in amending Section 2, Congress suddenly retreated from its general commitment to racial equality in voting and adopted a statute providing only tokenism and minimal political participation. That is certainly not what the Congress thought it was doing. As the Senate Report provides, the purpose of the 1982

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[7]Voting Rights Act Amendments of 1970, 84 Stat. 314 (extending Section 5 coverage and the other special provisions of the Act for five more years; adding jurisdictions for special coverage; establishing a five year nationwide ban on literacy tests); Act of August 6, 1975, 89 Stat. 402 (extending Section 5 and the other special provisions for seven additional years; making permanent the nationwide ban on literacy tests; extending Section 5 to language minorities and requiring bilingual registration and elections in certain jurisdictions); Voting Rights Act Amendments of 1982, 96 Stat. 131 (extending Section 5 for twenty-five years and amending Section 2).

legislation was to "extend the essential protections of the historic Voting Rights Act...[and] insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future." Senate Rep. at 4.

Modern congressional civil rights enforcement policy in other areas has similarly not been one of minimalism. Congress, for example, clearly intended to protect more than token access to public accommodations when it enacted Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et. seq.. See, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963), reprinted in [1964] 2 U.S. Code Cong. & Ad. News 2393 ("It is...necessary for the Congress to enact legislation which prohibits and provides

the means to terminating the most serious types of discrimination.") Congress also sought to protect more than token access to employment opportunities and jury service when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., and the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et. seq. H.R. Rep. No. 914, supra, U.S. Code Cong. & Ad. News at 2401 ("the purpose of this title is to eliminate...discrimination in employment based on race, color, religion, or national origin."); H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), reprinted in [1968] 2 U.S. Code Cong. & Ad. News 1793 (a major purpose of the Federal Jury Act is to establish "an effective bulwark against impermissible forms of discrimination and arbitrariness in jury

selection.")

Section 2 does not guarantee proportional representation any more than Title II guarantees proportional occupancy of places of public accommodation, or Title VII guarantees proportionality in hiring, or the Federal Jury Act guarantees juries that proportionately represent minorities. See, e.g., United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974) ("The Act was not intended to require precise proportional representation of minority groups on grand or petit jury panels.") But certainly Title II could not be rationally construed to bar a challenge to an otherwise discriminatory public accommodations policy merely because any given number of rooms were let to blacks, nor could Title VII be construed to bar an otherwise valid

employment discrimination claim merely because a token number of minorities had been hired, nor could the Federal Jury Act be deemed to bar a challenge to a discriminatory jury selection system merely because a few blacks were allowed into the jury pool. Such a reading of congressional civil rights laws would be illogical and totally contrary to the intent of Congress in legislating against discrimination. Yet, that is the untenable position of the State and the Solicitor General in this case.

If the State and the Solicitor General prevail in their argument, it will be impossible to eradicate discriminatory election procedures in places where minority candidates have had some success. In addition, those jurisdictions in which black candidates have had no success will be encouraged,

as Congress found, to manipulate the election of a "safe" or token minority candidate to give the appearance of racial fairness and thwart successful dilution challenges to discriminatory election schemes. As a result, there will be no incentive for voluntary compliance with Section 2, and every inducement for circumvention and continued litigation. Future progress in minority voting rights will be dealt a severe setback.

II. THE DISTRICT COURT PROPERLY FOUND RACIAL BLOC VOTING.

A. The Court Applied Correct Standards

The State and the Solicitor General argue that the district court applied a

legally incorrect definition of bloc voting which vitiates its conclusions that the challenged districts dilute minority voting strength.[8] According to the State, the lower court applied the test that "polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate." Appellants' Brief, p. 36. According to the Solicitor General, the court adopted a definition that polarized voting occurs "whenever 'the results of the individual election would have been different depending upon whether it had been held among only the white voters or the black voters in the

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[8]The State concedes that Appellees' calculations were basically accurate, and that the methods of analysis used "were standard in the literature." 590 F. Supp. at 368.

election.'" Brief for the United States as Amicus Curiae, p. 29.

While it is true, as the trial court noted, that in none of the elections did a black candidate receive a majority of white votes cast, 590 F. Supp. at 368, and that in all but two of the elections the results would have been different depending upon whether they had been held among only the white or only the black voters, id., the court did not base its finding of bloc voting merely upon these facts. The district court examined extensive statistical evidence of 53 sets of election returns involving black candidacies in all the challenged districts, heard expert and lay testimony and concluded that:

> On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates

> either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested.
> Id.

The court also found that the polarization was statistically significant in every election in that the probability of it occurring by chance was less than one in 100,000. Id.[9] Taking the opinion as a whole, it

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[9]The court determined "statistical significance" by examining the
[Footnote continued]

is clear that the district court did not adopt or apply a narrow, simplistic or legally incorrect definition of polarized voting.[10]

The State also contends that racial bloc voting in the challenged districts is irrelevant where a black won an election. Appellants' Brief, pp. 39-40: "Racially polarized voting is

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correlations between the race of voters and candidates prepared by Appellees' expert. While "correlations above an absolute value of .5 are relatively rare and correlations above .9 extremely rare...[a]ll correlations found by Dr. Grofman in the elections studied had absolute values between .7 and .98, with most above .9. This revealed statistical significance at the .00001 level - probability of chance as explanation for the coincidence of voter's and candidate's race less than one in 100,000." 590 F. Supp. at 368 n.30.

[10]Both the State and the Solicitor General have opinions about when bloc voting is relevant, but neither, it should be noted, attempted to define racial bloc voting.

significant...when the black candidate does not receive enough white support to win the election...The mere presence of different voting patterns in the white and black electorate does not prove anything one way or the other about vote dilution." Given this analysis, 100% voting along racial lines would be irrelevant in a challenge to multi-member district elections if blacks were able to single-shot a black into office. Congress indicated in the statute and the legislative history, however, that the totality of relevant circumstances should be considered. One of the relevant circumstances, regardless of other factors that may be present, is bloc voting.

B. The Court's Methodolgy Was Acceptable

In finding racial bloc voting, the court below relied upon two methods of statistical analysis employed by Appellees' expert: extreme case analysis and bivariate ecological regression analysis.[11] Both methods are "standard in the literature," as the lower court found, 590 F. Supp. at 367 n.29, and both have been extensively used by the courts in voting cases in establishing the presence or absence of racial bloc

[11]Extreme case analysis compares the race of voters and candidates in racially homogeneous precincts. Regression analysis uses data from all precincts and corrects for the fact that voters in homogeneous and non-homogeneous precincts may vote differently. 590 F. Supp. at 367 n.29.

voting.[12]

In Lodge v. Buxton, Civ. No. 176-55 (S.D. Ga. Oct. 26, 1978), slip op. at 7-8, the trial court found racial bloc voting in Burke County, Georgia, based upon simple extreme case analysis in two elections in which blacks were candidates, a third election in which a white sympathetic to black political

[12]Not all cases finding vote dilution, however, have made findings of bloc voting. Neither White v. Regester, supra, nor Zimmer v. McKeithen, supra, the cases principally relied upon by Congress in establishing the results standard of Section 2, made specific findings that voting was racially polarized. The legislative history of Section 2 makes bloc voting a relevant factor but does not indicate that it is a requirement for a violation. See, e.g., United States v. Marengo County Commission, 731 F.2d 1546, 1566 (11th Cir. 1984), citing the Senate Report and concluding that "[w]e therefore do not hold that a dilution claim cannot be made out in the absence of racially polarized voting."

interests was a candidate and a fourth election in which a black had won a city council seat in a district with a high percentage of black voters. The court's analysis and discussion of bloc voting is set out in Appendix A to this brief. This Court affirmed the finding of bloc voting in Burke County and the conclusion that the at-large elections were unconstitutional. Rogers v. Lodge, 458 U.S. 613, 623 (1982) ("there was also overwhelming evidence of bloc voting along racial lines").

For other cases approving the use of extreme case or regression analysis to prove bloc voting, see City of Petersburg v. United States, 354 F. Supp. 1021, 1026 n.10 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973); Bolden v. City of Mobile, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976) ("Regression analysis

is a professionally accepted method of analyzing data."), aff'd, 571 F.2d 238 (5th Cir. 1978), rev'd on other grounds, 446 U.S. 55 (1980); Nevett v. Sides, 571 F.2d 209, 223 n.18 (5th Cir. 1978) ("bloc voting may be demonstrated by more direct means as well, such as statistical analyses, e.g. Bolden v. City of Mobile"); NAACP v. Gadsden County School Board, 691 F.2d 978, 982-3 (11th Cir. 1982) (finding "compelling" evidence of racial bloc voting based upon bivariate analysis); United States v. Marengo County Commission, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984); McMillan v. Escambia County, 748 F.2d 1037, 1043 n.12 (5th Cir. 1984) (confirming the use of regression analysis comparing race of voters and candidates to prove bloc voting); Jones v. City of Lubbock, 727 F.2d 364, 380-81

(5th Cir. 1984) (approving the use of bivariate regression analysis).

The State contends, however, that bivariate regression analysis is "severely flawed" and that the presence of racial bloc voting can only be estalished by use of a multivariate analysis that tests or regresses for factors other than race, such as age, religion, income, education, party affiliation, campaign expenditures, or "any other factor that could have influenced the election." Appellants' Brief, pp. 41-2.[13] The State relies

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[13]The Solicitor General does not support the Appellants on this point, but agrees with the Appellees that "[i]n most vote dilution cases, a plaintiff can establish a prima facie case of racial bloc voting by using a statistical analysis of voting patterns that compares the race of a candidate with the race of the voters." Brief for the United States as Amicus Curiae, p. 30 n.57.

principally upon the concurring opinion of Judge Higginbotham in Jones v. City of Lubbock, 730 F.2d 233, 234 (5th Cir. 1984), denying rehearing to 727 F.2d 364 (5th Cir. 1984), in which he says in dicta that proof of a high correlation between race of voters and candidates may not prove bloc voting in every case and that it "will often be essential" to eliminate all other variables that might explain voting behavior.

Not only has this Court expressly approved findings of bloc voting based upon extreme case and regression analysis, but it has rejected the contention that multivariate regressional analysis is required. In Jordan v. Winter, Civ. No. GC-80-WK-O (N.D. Miss. April 16, 1984), slip op. at 11, the three judge court invalidated

under Section 2 the structure of Mississippi's second congressional district in part upon a finding of a "high degree of racially polarized voting" based upon a bivariate regression analysis comparing the race of candidates and voters in the 1982 elections. The State appealed, Allain v. Brooks, No. 83-2053, and challenged the finding of bloc voting, citing Judge Higginbotham's concurring opinion in Lubbock (id., Jurisdictional Statement at 12-3).[14]

[14]See also, Justice Stevens concurring opinion in Mississippi Republican Executive Committee v. Brooks, ___ U.S. ___, 105 S. Ct. 416 n.1 (1985), noting that the Jurisdictional Statement in No. 83-2053 "presents the question whether the District Court erroneously found...that there has been racially polarized voting in Mississippi."

> The use of a regression analysis which correlates only racial make-up of the precinct with race of the candidate 'ignores the reality that race...may mask a host of other explanatory variables.' [730 F.2d] at 235.

This Court summarily affirmed, sub nom. Mississippi Republican Executive Committee v. Brooks, ___U.S.___, 105 S.Ct. 416 (1984), thereby rejecting the specific challenge to the sufficiency of bivariate regression analysis to prove racial bloc voting contained in the jurisdictional statement. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

It should be reemphasized that Judge Higginbotham ruled for the plaintiffs in Lubbock and concurred in the judgment affirming the dilution finding by the district court. He concluded that the defendants, other

than criticizing the plaintiffs' methodology, failed to offer any statistical evidence of their own in rebuttal, and that accordingly plaintiffs must be deemed to have established bloc voting:

> given that there is no evidence to rebut plaintiffs' proof other than the city's criticism of Dr. Brischetto's study and its attempt to show responsiveness, I agree with Judge Randall that the record is not so barren as to render clearly erroneous the finding by the district court that bloc voting was established.
> 730 F.2d at 236.

Thus, the most that can be argued from Judge Higginbotham's concurrence is that where plaintiffs prove bloc voting by correlation analysis, the proof must stand unless defendants rebut plaintiffs' evidence with statistics of their own. The State made no such rebuttal here.

In United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984), the district court found evidence of bloc voting based upon the correlation of race of candidates with voting, 739 F.2d at 1535 n.4, but discounted it because of supposedly non-racial factors, e.g. voter apathy, the advantage of incumbency, blacks ran as "fringe party" candidates, etc. 739 F.2d at 1536. The court of appeals rejected these non-racial explanations for the defeat of black candidates because of lack of support in the record. Id. The case thus approves the proposition that it is sufficient to establish racial bloc voting by bivariate analysis, and if such a finding is to be discounted, there must be contradicting evidence in the record. The State produced no

contradicting evidence in this case and as a result its argument that bloc voting was not proved should be unavailing.

C. The Court Should Not Adopt a Rigid Definition or Method of Proof of Bloc Voting

Aside from requiring polarization to be significant, this Court should not adopt any additional definition of racial bloc voting. Section 2 analysis requires a court to evaluate the particular, unique facts of individual cases. Imposing any rigid definition of bloc voting in advance would thus be inconsistent with the totality of circumstances and individual appraisal approach to dilution claims which

Congress has adopted. It might also lead to findings of bloc voting or no bloc voting in individual cases which, in view of the totality of factors, would be simply arbitrary.

This Court has avoided a single formula approach to proof of polarization or discrimination in other areas of civil rights law. In jury discrimination cases, for example, this Court and lower federal courts have used a number of tests for establishing a prima facie showing of minority exclusion but have never indicated that one method of statistical analysis is required in every instance.

In Swain v. Alabama, 380 U.S. 202 (1965), the Court indicated that a disparity as great as 10% between blacks in the population and blacks summoned for jury duty would not prove a prima

facie case of unconstitutional underrepresentation. Swain was generally applied to mean that disparities in excess of 10% would be unconstitutional. Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975) (Appendix to the Opinion of Judge Gewin). The so-called "absolute deficiency" method of analysis used in Swain does not give a true picture of underrepresentation, however, when the minority group is small. For example, if the excluded group were 20% of the population and 10% of those summoned for jury duty, the absolute deficiency would only be 10%, whereas in fact the group would be underrepresented by one-half.

To meet the limitations of the absolute deficiency standard, this Court and lower federal courts have also used a comparative deficiency test for

measuring underrepresentation, by which the absolute disparity is divided by the proportion of the population comprising the specified category. Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972) (using both the absolute and comparative deficiency methods); Berry v. Cooper, 577 F.2d 322, 326 n.11 (5th Cir. 1978); Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971). Those courts using the comparative deficiency standard have not, however, adopted any particular cut off for racial exclusion.

This Court has also referred to, without requiring that it be used, a third method of calculating underrepresentation in jury selection, the statistical significance test. Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977); Alexander v. Louisiana, supra, 405 U.S. at 630 n.9, 632. The

test measures representativeness by calculating the probability of a disparity occurring by chance in a random drawing from the population. The district court in this case used this method of analysis in part to support its finding of bloc voting.

It is apparent from examining the cases that this Court has not required a single mathematical formula or standard for measuring underrepresentation in all jury selection cases and has, in fact, expressly declined to do so. Alexander v. Louisiana, supra, 405 U.S. at 630. A similar approach to proof of bloc voting in vote dilution cases would therefore be consistent with this Court's treatment of related discrimination issues in other cases.

It is significant that none of the tests for jury exclusion used by this

Court has required challengers to disprove non-racial factors as the explanation for minority underrepresentation. Instead, once a prima facie case has been made using some form of bivariate analysis, the courts have held that the burden of proving selection procedures are racially neutral shifts to election officials. Alexander v. Louisiana, supra, 405 U.S. at 632; Casteneda v. Partida, supra, 430 U.S. at 497-98. In the context of vote dilution litigation, defendants might attempt to disprove bloc voting by any method of analysis they chose, including multivariate regression analysis, but that should be no part of plaintiffs' case.

It would be plainly inconsistent with the intent of Congress to require plaintiffs to conduct multivariate

analysis in Section 2 cases. In amending Section 2 Congress adopted the pre-Mobile dilution standards, and bivariate correlation analysis was an accepted method of proving bloc voting. Therefore, this method of proof should be satisfactory under Section 2.

Requiring plaintiffs to conduct multivariate regression analysis would also shift a court's inquiry from the result or fact of voting along racial lines to the intent of voters, an inquiry which Congress intended to pretermit in amending Section 2. Congress adopted the results standard for three basic reasons. First, the Bolden intent test "asks the wrong question." Senate Rep. No. 97-417 at 36. If minorities are denied a fair opportunity to participate in politics, existing procedures should be changed

regardless of the reasons the procedures were established or are being maintained. Second, the intent test is "unnecessarily divisive" because it requires plaintiffs to prove the existence of racism. Id. Third, "the intent test will be an inordinately difficult burden for plaintiffs in most cases." Id.

It would be tantamount to the repeal of the 1982 law to say that proof of intent is not required in Section 2 cases, and at the same time make plaintiffs prove that voters were voting purposefully for reasons of race to establish a violation. Such an evidentiary burden would again ask the "wrong question," would be unnecessarily divisive and would place inordinately difficult burdens on minority plaintiffs. It would essentially

nullify the intent of Congress in enacting the statute.

There are a number of very practical considerations, not discussed by the State at all, which further demonstrate the inherent unfairness, and in some cases the impossibility, of requiring minority plaintiffs to conduct multivariate regression analysis.

(1) Impossibility. In some cases it will simply be impossible to do any kind of regression analysis, or even an extreme case analysis, i.e., where there is only one or no homogenious precincts. Requiring a multivariate regression analysis in a city with only one polling place, such as Moultrie, Georgia, see Cross v. Baxter, 604 F.2d 875, 880 n.8 (5th Cir. 1979), would absolutely foreclose a dilution challenge, even through minorities were

totally shut out of the political process and polarization was complete.[15] Such a result would be absurd and contrary to the intent of Congress in amending Section 2.

In still other cases, regression or even extreme case analysis will be impossible to perform because election records no longer exist or cannot be broken down into precincts. Such was the situation in Rome, Georgia, where the trial court nonetheless found bloc voting and denied Section 5 preclearance to a number of municipal voting

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[15] In Cross, the court of appeals held simply that a finding by the trial court of no bloc voting "on this record" would be clearly erroneous where "[n]o black candidate has ever received even a plurality of white votes and Wilson, the first black elected to the council appears to have received as little as 5% of white votes." Id.

changes. City of Rome, Georgia v. United States, 472 F. Supp. 221, 226 n.36 (D.C. 1979). This Court affirmed, concluding that the district court did not err in determining "that racial bloc voting existed in Rome." City of Rome v. United States, 446 U.S. 156, 183 (1980).

(2) Quantification. The State ignores the enormous burden, and in some instances the impossibility, of quantifying, i.e. expressing in numbers, all the non-racial factors potentially influencing voters. It would be difficult indeed to quantify candidate expenditures or name recognition, or as the State suggests, "any other factor that could have influenced the election," by precinct. Appellants' Brief, pp. 41-2. Perhaps these factors could be quantified through extensive

surveys; perhaps not. But in any case, the attempt to quantify them would be enormously difficult, time consuming and expensive and in most cases the burden on minority plaintiffs would be prohibitive.

The State's suggestion that plaintiffs quantify and regress "any other factor" that might have influenced the elections would send plaintiffs on a wild goose chase. Even if it were possible, both financially and literally, for plaintiffs to provide a multivariate analysis, defendants would claim - as the State has here - that allegedly relevant factors were omitted and that the analysis thus must fail. The State's argument is little more than a prescription for maintenance of discriminatory election practices.

(3) Unavailable Precinct Level

Data. The State fails to note that correlation analysis is almost always based upon precinct level data. While racial data is usually available, precinct level data for income, education, etc., generally does not exist. The Census contains some of this information by enumeration districts, or in some states by block data, but not by precincts. The cost and time involved in extractng non-racial variables from the Census at the precinct level, to the extent that they are available at all, would _ be overwhelming if not prohibitive.

The State's contention that Appellees must conduct a multivariate analysis is contrary to Section 2, the legislative history and the prior decisions of this Court. The finding of bloc voting and the methodology of the

lower court in this case were entirely correct.

CONCLUSION

Amici Curiae respectfully urge the Court to affirm the judgment below on the grounds that the trial court properly applied amended Section 2 to find that North Carolina's 1982 legislative apportionment impermissibly dilutes minority voting strength.

Respectfully submitted,

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APPENDIX A

Trial Court's Analysis of Bloc Voting in **Lodge v. Buxton**, Civ. No. 176-55 (S.D. Ga. Oct. 26, 1978), slip. op. at 7-9

There was a clear evidence of bloc voting the only time Blacks ran for County Commissioner. Obviously, this must be ascribed in part to past discrimination. There are three Militia Districts in which Blacks are in a clear majority, the 66th, 72d and 74th.[7] In a fourth district, the 69th, as of 1978, there were only a few more Blacks than Whites. One black candidate, Mr.

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[7]The Court finds the following to be a reasonably accurate estimate of the registered voters by race in each district, as of 1978.

Precinct	Black	White	Total
Waynesboro 60-62 District	1,050	2,149	3,199
Munnerlyn 61st District	44	50	94
Alexander 63rd District	75	104	179
Sardis 64th District	211	478	689
Keysville 65th District	163	214	377
Shell Bluff 66th District	167	82	249
Greenscutt 67th District	49	215	264
Girard 68th District	110	195	305
St. Clair 69th District	29	26	55
Vidette 71st District	52	112	164
Gough 72d District	201	68	269
Midville 73rd District	184	195	379
Scotts Store 74th District	98	52	150
Total	2,433	3,940	6,373

[Footnote continued]

Childers, won in the four black districts, losing in all of the others. The other black candidate, Mr. Reynolds, won in three of the black districts losing in all of the others.[8]

Similarly, in 1970 Dr. John Palmer, a white physician from Waynesboro, who open the first integrated waiting room in Burke County, ran for County Commission. Generally, he was thought of as being sympathetic to black political interests. He was soundly defeated.

In the recent city council election in Waynesboro, the county seat, a Black was elected to the council for the first time in history. This event can be

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[8]Plaintiffs' Request for Admissions, filed June 5, 1970, Exhibits I-3 and I-4.

attributed to the high degree of bloc voting, and to the fact that the elected Black ran in a district with a high percentage of black residents.[9]

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[9]This was possible because this Court created single-member districts. See Sullivan v. DeLoach, Civil No. 176-238 (S.D. Ga.) Order entered September 11, 1977.